IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-302

WARREN RANKINS, Superintendent-Principal of the Ducor Union School District, JOAQUIN PARSONS, RICHARD OWEN, JAMES FLYNN, FRANK SILVA, and LAWRENCE SOUTHARD, Members of the Board of Trustees of the Ducor Union School District, and the DUCOR UNION SCHOOL DISTRICT,

Appellants,

vs.

COMMISSION ON PROFESSIONAL COMPETENCE OF THE DUCOR UNION SCHOOL DISTRICT, and the Members thereof, RUDOLF H. MICHAELS, KARYL (CINDI) RUBIN, CLYDE SIMPSON and THOMAS EDWARD BYARS,

Appellees.

MOTION OF APPELLEE THOMAS EDWARD BYARS TO DISMISS OR AFFIRM

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MOTION OF APPELLEE
THOMAS EDWARD BYARS
TO DISMISS OR AFFIRM

To The Honorable Justices of the Supreme Court of the United States:

Pursuant to Rule 16, appellee Thomas Edward Byars hereby moves this Court to dismiss the purported appeal of appellants, or, in the alternative,

to affirm the judgment of the Supreme Court of the State of California, on the following grounds:

(a) The appeal should be dismissed on the grounds that it does not present a substantial federal question and

(b) The judgment sought to be reviewed by the appeal should be affirmed because the alleged federal question on which the decision of the cause depends is so insubstantial as not to merit further argument and because the judgment of the California Supreme Court was clearly correct.

QUESTIONS PRESENTED

It is our position that there is no bona fide federal question presented. The only substantial question presented in the case at bar is a question of interpretation of Article I, §8 of the California Constitution. That provision prohibits the disqualification of a person from entering or pursuing a profession or employment because of, among other things, creed.[1/] In the instant case the California Supreme Court interpreted the word "creed" to mean religious beliefs (see, e.g., pp. F-4 to F-6 of appellants' "Jurisdictional Statement"), and interpreted the constitutional

1/ The full text of Article I, §8 of the California Constitution is set out at page 4 of appellants' "Jurisdictional Statement."

provision to mean that discrimination in employment by reason of such religious beliefs is prohibited (id at pp. F-7 to F-8).[2/]

The only federal question appellants contend is presented is based upon the "establishment of religion" clause of the First Amendment of the United States Constitution. This is clearly an insubstantial contention. It was only urged by appellants in the proceedings below casually and as a "makeweight." Their main contention throughout was based upon the interpretation of the above provision of the California Constitution, and the California Courts so viewed the issues.[3/]

2/ Appendix F annexed to appellants' "Jurisdictional Statement" sets forth the opinion of the California Supreme Court from which appellants purport to appeal. That opinion is reported at 24 Cal. 3d 167, 154 Cal. Rptr. 907, and 593 P. 2d 852. For the convenience of the Court, we will herein cite to Appendix F of Appellants' "Jurisdictional Statement" when referring to the California Supreme Court opinion.

3/ Thus, while the California Supreme Court split 4-3 in this case, the dissenters did not even mention the "establishment" clause (see Dissenting Opinion at pp. F-15 to F-21 of Appendix to appellants' "Jurisdictional Statement"). The dissenters differed with the majority's interpretation of the California Constitution. The only clause of the United States Constitution referred to in the dissenting opinion is the "free exercise" clause of the First Amendment (see, e.g., Disenting Opinion at pp. F-17 and F-20).

(continued on p. 4)

The reason that there is no merit in the claim based on the "establishment" clause is succinctly set forth on the last two pages of the majority opinion of the California Supreme Court (pp. F-13 to F-14), which will be discussed further below (Point I, infra). And the practical effect of the ruling appellants seek from this Court would be not only to permit, but to compel, school districts to discharge all teachers who are conscientious practitioners of religions other than the majority Christian religions (Point I, infra). Such a result would have a catastrophic effect on all school districts in this country, which employ numerous teachers practicing minority religions.[4/] Additionally, this

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3/ (continued from previous page)

Similarly, the opinions of the California Court of Appeal and the California Superior Court (annexed to appellants' "Jurisdictional Statement" as Appendices "E" and "C," respectively) do not discuss the "establishment" clause. The California Court of Appeal opinion specifically states: "We are not here concerned with the establishment clause of the First Amendment." (p. E-6).

4/ It should be noted that many of the Holy Days of appellee Byars' religion are identical with the Holy Days of the Jewish religion. The Worldwide Church of God observes the same Sabbath as the Jewish religion (Clerk's Transcript 54; Exhibit B introduced at the hearing, pp. 11-21, 39-42). The Feast of Trumpets Holy Day of the Worldwide Church of God is the same as the Rosh Hashanah of the Jewish religion (ibid). The Day of Atonement Holy Day of the Worldwide Church of God

(continued on p. 5)

result would afford xenophobic and provincial school boards carte blanche to eliminate from their schools all adherents of religious beliefs antipathetic to the members of such school boards (see Point I, infra).

STATUTES INVOLVED

As indicated, Article I, §8 of the California Constitution is the only provision as to which any serious issue is presented, and that does not present any federal question. Appellants also contend that the "establishment clause" of the First Amendment of the United States Constitution is involved (appellants' "Jurisdictional Statement" at p. 4).

STATEMENT OF THE CASE

The "Statement of the Case" set forth by appellants (at pp. 4-6 of their "Jurisdictional Statement") may perhaps be true, but it is inexhaustive. A complete statement of the case is found in the opinion of the California Supreme Court

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4/ (continued from previous page)

is the same as the Yom Kippur of the Jewish religion, and so forth (ibid). The ruling appellants seek would clearly enable school districts to conduct a wholesale purging of teachers who are conscientious practitioners of the Jewish religion and, indeed, would compel such a result (see Point I, infra).

(pp. F-2 to F-4). As that opinion shows, Mr. Byars joined the Worldwide Church of God in 1971, and his religious sincerity subsequent to that time is unquestioned (p. F-2).[5/]

Thereafter, Mr. Byars requested permission to be absent (without pay) on his religion's Holy Days (opinion of the California Supreme Court at p. F-2). These requests were always submitted well in advance, and Mr. Byars prepared detailed lesson plans for his substitute to follow in his absence (ibid). The same substitute was employed for most absences in each school year (ibid).

The appellant school district sought to compel Mr. Byars to abandon his religion, as a price for continued employment, and demanded that he teach on those of his religion's Holy Days that were not religious Holy Days of the majority Christian

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5/ Appellants apparently believe it significant that Mr. Byars did not mention the Worldwide Church of God in his initial job interview in 1969, and that he made no requests for leaves of absences until the 1971-1972 school year (appellants' "Jurisdictional Statement" at pp. 4-5). Appellants thus appear to be insinuating that Mr. Byars' subsequent decision to adopt the Worldwide Church of God religion is somehow a pretext. However, no such claim has heretofore been asserted during the course of the four years this proceeding has thus far consumed, and, as shown in text, the factual findings establish that Mr. Byars' religious beliefs were sincere and constituted the sole motivation for seeking the leaves of absence at issue here.

religions (opinion of the California Supreme Court, pp. F-2 to F-3). When he refused to forsake the precepts of his religion, appellants sought to discharge him. (id at p. F-3).

Mr. Byars requested a hearing before the Commission on Professional Competence, the body designated by California law to rule on teacher rights disputes (opinion of the California Supreme Court at p. F-3). At the hearing before the Board, the only evidence introduced of detriment caused by Mr. Byars' absences was some cursory testimony of the district superintendent to the effect that a substitute cannot equal a good regular teacher (ibid). However, it was undisputed that other school districts in California allowed teachers to observe the Worldwide Church of God Holy Days without hindrance or threat of discharge (ibid), and that teachers were allowed 10 days' "personal necessity" leave (pp. F-9 and F-10).

Although appellants' "Jurisdictional Statement" professes zeal for the principle of separation of church and state, it is undisputed that they at all times accommodated the religious beliefs of adherents of the majority Christian religions. They scrupulously observed Christmas and Easter (opinion of the California Supreme Court at p. F-14), and the record is devoid of any attempt on the part of appellants to compel teachers to work during these periods or on Sundays.

The Commission for Professional Competence found for Mr. Byars and thereafter appellants appealed this decision to the California courts, with the result that four separate tribunals, comprising a total of eleven judges and three hearing officers, have now ruled on this matter.

As we have previously observed (FN 3, supra), not one member of any of these tribunals has ever mentioned or suggested, even remotely, that affording Mr. Byars the religious absences in controversy would violate the "establishment of religion" clause. Yet this insubstantial claim constitutes the sole ground of appellants' present purported appeal to this Court.

As we will now show, this purported appeal should be dismissed or, in the alternative, the judgment of the California Supreme Court should be affirmed.

ARGUMENT

I
THE APPEAL SHOULD BE DISMISSED

We believe the appeal should be dismissed because it does not present a substantial federal question. As shown above, the sole purported "federal question" presented is whether the "establishment of religion" clause is violated when teachers are permitted time off, without pay, to observe their religious beliefs. If such a practice could conceivably be found to violate the "establishment of religion" clause, two consequences would flow:

1. Any school district in the United States would be afforded an unlimited right to practice

rank religious discrimination, merely by adopting a policy of refusing leave for whatever religious holidays are observed by the religion it seeks to discriminate against; and

2. Perhaps even more ominously, all school districts in the United States would be compelled to refuse all religious absences, and hence the only persons who would be permitted to teach in the public schools in this country would be those who do not have any sincere religious beliefs.

Appellants' previous briefs demonstrate that their contention with respect to the "establishment of religion" clause would have the foregoing effects. They have argued that the "establishment of religion" clause forbids them from permitting absences for religious reasons. Thus, in their Brief filed in the California Court of Appeal (dated May 19, 1977), appellants stated as follows:

> "The other side of the coin is whether the Ducor Union School District Board of Trustees or Superintendent has the power to grant a leave of absence for religious purposes without violating the Establishment Clause of the First Amendment of the United States Constitution. . . . This clause is likewise applicable to political subdivisions of the State [citation]. Not only is the government barred from supporting an established church, it may not prefer any religion to another. [citations] In the present case, the Worldwide Church of God seeks

preferential treatment by asking that Mr. Byars be excused from his teaching duties to observe the sect's religious holidays."

Appellants' Brief to the California Court of Appeal at p. 16

Appellants then discussed the inapposite California case of Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) and continued:

"Applying these tests and following the Court in Mandel, we submit that the rule contended for by Mr. Byars would likewise violate the Establishment Clause. It can scarcely be said that such a rule would have a secular purpose. Such a leave-of-absence policy would advance the interests of the Worldwide Church of God. It would surely entangle the School District with religion.

"For these reasons, the Ducor Union School District submits that it could not grant the leave of absence without violating the Establishment Clause of the First Amendment of the United States Constitution."

Appellants' Brief to the California Court of Appeal at p. 17 (emphasis added) See also: Appellants' "Jurisdictional Statement" at pp. 7-8

Under the construction appellants urge this Court to adopt, then, no school district in the United States could grant a religious absence to any teacher. It is self-evident that such a ruling would have a catastrophic effect, not only on the literally tens of thousands of dedicated teachers of minority religions, but also on public education itself; our system of public education could not easily adjust to the massive discharge of teachers that would be compelled by the ruling appellants seek.

The vacuous and mischievous nature of appellants' contention that the establishment of religion clause permits, and even requires, them to discharge appellee Byars is thus manifest. The California Supreme Court succinctly answered said contention, as follows:

"We think it clear that the purpose and the primary effect of imposing a . . . duty of accommodation under article I, section 8 of the California Constitution are not to favor any religion but to promote equal employment opportunities for members of all religious faiths. The neutrality commanded by the establishment clause does not require the district to extend its accommodation for Byars' religious observances to other employees who seek time off for secular purposes. Without violating the establishment clause, governments may lighten the burden consequent on religious practices through laws that are 'secular in purpose, evenhanded in operation, and neutral in primary impact.' [citation] . . . the

reasonable accommodation for Byars' religious observances required by article I, section 8 does not necessitate expenditure of money or preference of one religion over another. On the contrary, the effect of the accommodation is simply to lessen the discrepancy between the conditions imposed on Byars' religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations of regular school calendars. Article I, section 8 does not require full equality of treatment of all employees' religious practices under all circumstances. It does require whatever reduction of inequality of treatment is possible through reasonable steps that do not impose undue hardship on employers."

pp. F-13 and F-14
emphasis added

Appellants do not explain how their reliance on the "establishment of religion" clause can be reconciled with their accommodation of adherents of majority religions. Appellants certainly have never evinced any intention to abandon this accommodation; they simply seek to emasculate and destroy equal employment rights for conscientious adherents of minority religions which may have different Holy Days.

It is, of course, clear that the establishment of religion clause cannot be distorted in the fanciful manner sought by appellants. See, e.g.: Gillette v. United States, 401 U.S. 437, 449-459, 91 S.Ct. 828, 836 (exemption of conscientious objectors from military service); Walz v. Tax Commission, 397 U. S. 664, 673, 90 S.Ct. 1409, 1413 (property tax exemption for churches upheld; religious groups are considered "beneficial and stabilizing influences in community life"); McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101 (Sunday closing laws). The authority which is perhaps closest on its facts to the case at bar demonstrates that the "establishment" clause cannot be wielded to permit rank religious discrimination. Sherbert v. Verner, 374 U.S. 398, 409-410, 83 S.Ct. 1790, 1797 (appellant, a Seventh Day Adventist, was fired for refusing to work on Saturday, the Sabbath day of her faith. This Court held that unemployment insurance benefits could not be denied appellant because of her religious beliefs. With respect to the claim that the "establishment" clause precluded payment of benefits, this Court said that extension of such benefits "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, . . . [the State] may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions" [emphasis added]).

It is therefore respectfully submitted that the instant appeal does not present a substantial federal question. The appeal should therefore be dismissed.

II
THE JUDGMENT SOUGHT TO BE REVIEWED SHOULD BE AFFIRMED.

We respectfully submit that the foregoing discussion demonstrates that the question on which the decision of the cause depends is so insubstantial as not to merit further argument. No authority has ever held that the widespread and prevalent practice of permitting teachers days off for religious holidays even remotely approaches the type of entanglement with religion that would invoke the "establishment" clause. (See Walz v. Tax Commission, supra, wherein this Court noted that "an unbroken practice . . . is not something to be lightly cast aside" [397 U.S. at p. 678, 90 S.Ct. at p. 1416]).

Moreover, and in any event, the judgment of the California Supreme Court was clearly correct. The prohibition of religious discrimination which is the underpinning of said decision, and of the clause in the California Constitution on which it is based, manifestly merits affirmance.

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

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